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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 2.

GRAVER TANK & MFG. CO., INC., THE LINCOLN ELECTRIC COMPANY, GRAVER TANK & MFG. CORPORATION,

Petitioners,

vs.

THE LINDE AIR PRODUCTS COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S REPLY BRIEF ON REHEARING.

JOHN T. CAHILL,
Attorney for Respondent, The Linde Air Products Company.

Of Counsel:
JAMES A. FOWLER, JR.,
RICHARD R. WOLFE,
GEORGE N. BEAMER,
LOFTUS E. BECKER.

March 29, 1950.

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RESPONDENT'S REPLY BRIEF ON REHEARING.

This brief is in reply to "Petitioners' Reply Brief Upon Rehearing," served February 28, 1950, and it is filed pursuant to leave granted by this Court.

We shall take up petitioners' points in the order in which they are presented in petitioners' reply brief.

First, however, we desire to comment briefly on over-all deficiencies of petitioners' reply, which constitute broad gaps in their argument. These gain significance from the fact that fully five months elapsed between the service of our answering brief and their reply.

Willful Disregard of Trial Court's Findings.

In our main brief on rehearing, we quoted the specific findings of the Trial Court on the questions of fact arising under the doctrine of equivalents (pp. 17-20). We demonstrated that such findings covered each and every such fact issue as defined by this Court in the *Halliburton* case (329 U. S. 1) in 1946 (pp. 24-33).

We pointed out at that time that petitioners had not dared to face or take account of those facts (pp. 60-61).

In the five months which intervened between the service of our answering brief and their reply, petitioners were unable to devise any way to meet our argument based upon the actual findings.

The most notable feature of petitioners' argument is their refusal to quote or cite, much less to discuss, the actual findings made by the Trial Court. Nowhere in their reply brief may be found the slightest reference to such a finding as No. 20 (R. 926) which, in and of itself, destroys petitioners' whole position on this point.

Apparently petitioners think that, by ignoring them, they can conjure away findings expressly affirmed by this Court.

That attitude is a serious confession of weakness in view of the fact that petitioners, in their main brief on rehearing (pp. 32-33), went so far as to flatly contradict this Court's summary of the Trial Court's findings that

> "the Lincoln Electric Co. made, and the other petitioners used and sold, a flux substantially identical with that set forth in the valid composition claims of the patent in suit * * *" (see 336 U. S. 271, 275-276).

And such an attitude is certainly not in conformity with the expressed desire of this Court to hear

"argument as to the applicability of the doctrine of equivalents to the findings of fact in this case" (337 U. S. 910).

The Unquestioned Great Merit of the Jones *et al.* Invention.

Also in our main brief on rehearing, we discussed the findings of the Trial Court recognizing the great advance in the welding art made by the Jones *et al.* invention (p. 33 *et seq.*). We pointed out that such findings are always regarded as material in determining whether, and to what extent, the doctrine of equivalents should be applied (p. 34).

There is not a word on this point in petitioners' reply brief.

Misstatements of the Record.

Petitioners have not merely been guilty of disregarding the Trial Court's findings of fact. Their brief also contains reckless misstatements of the record.

For example, petitioners say in their reply brief:

> "*First.* Upon the trial no evidence was offered that manganese silicate, which Lincoln used, was a known equivalent of 'alkaline earth metal silicate' in welding fluxes" (p. 4).

That statement is incorrect.

During the direct examination of respondent's patent expert, Mr. Fishleigh, the following questions were asked and the following answers given:

> "Q. How would you define equivalent steps or elements of processes or compositions?

"A. Well, equivalent steps or elements are similar steps or elements operating in substantially the same way to produce substantially the same results.

"Q. Have you on these charts which you have mentioned as having prepared also indicated whether or not in your opinion the equivalents so defined of the steps or elements of these claims, are found in the accused Lincolnweld process and flux composition?

"The Witness: Yes, sir, I have" (R. 370-1).

After explaining the charts, the witness continued:

"With that in mind your Honor can see in any set of elements whether or not, in my opinion, the equivalent is found in defendant's structure, with an explanatory note justifying the 'Yes' if it is a 'Yes' in that column" (R. 372).

We shall call attention to other misstatements of the record in our point-by-point reply to petitioners' brief, below.

In Reply to Pages 1-3 of Petitioners' Reply Brief—Containing a Summary of Their Arguments.

Petitioners' reply brief begins with a so-called "short answer to Linde's argument," to the effect that there can be no infringement in this case, because "literal infringement" is lacking (p. 1).

That is not, and never has been, the law.

Judge Swygert in the Trial Court was the first to reject this "short answer." Almost three years ago he said:

"Since the accused flux is composed principally of manganese silicate, it does not literally infringe composition claims 18, 20, 22 and 23. Whether it actually infringes these claims depends upon what appli-

cation is made of the doctrine of equivalents" (R. 919-20).

"The accused Lincolnweld 660 flux is a calcium manganese aluminum silicate with calcium fluoride added, which in welding operation is in all respects equivalent to the compositions of the patent in suit. * * *" (Finding No. 21, R. 926).

"The accused Lincolnweld flux and the composition of the patent in suit are substantially identical in operation and in result" (Finding No. 20, R. 926).

"The defendants and each of them have infringed each of claims 18, 20, 22 and 23" (Conclusion No. 4, R. 928).

There is no ambiguity in this holding. It is based upon Judge Swygert's findings as to the facts of equivalence—that the patented and accused compositions are substantially the same thing.

This Court and the Court of Appeals for the Seventh Circuit affirmed Judge Swygert's holding, because both appellate courts were prepared to accept his painstaking and careful "findings covering all the factual issues" (see 336 U. S. 271, at 275).

Recognizing the inadequacy of their "short answer"—as they must—petitioners attempt to make three points against an application of the doctrine of equivalents in this case.

Each of their points is based upon a misstatement.

Their *First* point is based upon a misstatement of fact—that the Trial Court did not make factual findings of equivalence. The error in this is disclosed above (p. 2).

Petitioners' *Second* point is based upon a misstatement of law—that the doctrine of equivalents expired in 1892 and that since that time, "literal infringement" has been the sole and exclusive criterion of infringement.

We demonstrated the falsity of this contention in our main brief on rehearing (pp. 46-50). Petitioners' own explanation of the decisions to which we referred, although hidden in a footnote, supports Linde's position (see Petitioners' Brief Upon Rehearing, p. 10, fn. 5). To paraphrase the language of this Court in the *Sanitary Refrigerator* case (280 U. S. 30 (1929)), the Lincolnweld flux is:

> substantially identical, operating upon the same principle, and accomplishing the same result in the same way, and the slight change in one element is merely a colorable departure from the Jones *et al.* composition.

Petitioners' *Third* point is based upon a misstatement of Linde's position.

We do not contend merely that "Lincoln stole manganese silicate from Linde's patent" (Petitioners' Reply Brief, p. 2).

We contend instead that Lincoln stole Linde's patented welding composition, as disclosed and claimed in the Jones *et al.* patent, because that is the import of Judge Swygert's findings.

Those findings establish that what petitioners actually did was to copy the patented composition, in every respect but one. The only variation they made was to substitute for one element its "equivalent."

But, even this substitution was lifted from the face of the patent. There it was disclosed that such a replacement could be made in the patented composition without significant change in operation or result. No corresponding disclosure can be found anywhere in Miller. The Trial Court so found (R. 920-921).

Therefore, the only real issue posed on this appeal is whether this Court will reaffirm its approval of Judge Swy-

gert's findings to the effect that the accused and patented compositions are "equivalents"—that they are substantially the same thing.

Petitioners have shown no error in that determination as made by the able Trial Judge, nor have they given any reason why the power to make such a determination should be withdrawn from him.

In Reply to Pages 3-10 of Petitioners' Reply Brief—"I. Doctrine of Equivalents Can Have No Application to This Case in View of Trial Court's Findings," Etc.

We have dealt above (p. 2, *et seq.*) with petitioners' primary contention that Judge Swygert failed to find as a fact that the patented and accused compositions were "equivalents," by showing that the Trial Court did so find.

In Reply to Pages 3-6 of Petitioners' Reply Brief—"1. Trial Court Found Manganese Equivalent, Not Upon Fact Issue, But by Error of Law."

It is petitioners' willful refusal to face such findings which leads them to misinterpret the reference to the patent specifications in Judge Swygert's opinion, upon which petitioners place such great reliance.

As pointed out in our main brief on rehearing (pp. 61-63), this reference was made solely and exclusively on the issue of whether the established "equivalence" of manganese and the alkaline earth metals was "known" at the date of the invention. This is demonstrated by the language which petitioners, themselves, quote from the opinion, namely:

> "* * * no determination need be made whether it is a known chemical fact *outside* the teachings of the patent that manganese is an equivalent of calcium or magnesium" (R. 920, underlining supplied).

For this restricted purpose, it was clearly proper for the Trial Court to call attention to the fact that the specifications of the patent, itself, disclosed such equivalence.

In this connection, the Trial Court also called attention to the fact that petitioners introduced no evidence that they had looked elsewhere for their information (Finding No. 22, R. 926). This was strong confirmatory evidence that such equivalence had in fact been made "known" to petitioners by the specifications.

In Reply to Pages 6-10 of Petitioners' Reply Brief—"2. Manganese Could Not Be Held Equivalent; Failure to Claim Operates as Dedication."

This portion of petitioners' argument is premised on the implied admission that a patent upon a welding composition can be infringed by a welding composition which is substantially the same thing, even though "literal infringement" is lacking.

But, say petitioners in effect, the Lincolnweld flux is not substantially the same thing as the patented composition (Petitioners' Reply Brief, pp. 6-9).

Here again, the substance of petitioners' argument is an attack on the concurrent findings of both lower courts, as summarized by this Court in its original opinion that

> "the Lincoln Electric Co. made, and the other petitioners used and sold, a flux substantially identical with that set forth in the valid composition claims of the patent in suit and which could be made by a person skilled in the art merely by following

> its teachings. The petitioners introduced no evidence to show that their accused flux was derived, either from the prior art, by independent experiment or from any source other than the teachings of the patent in suit" (336 U. S. 271, 275-276).

The actual findings which fully support this summary are reviewed in our main brief on rehearing (pp. 7-21).

Petitioners cannot dispute these findings directly. Therefore, they attempt to circumvent them.

First, with the same complete lack of candor displayed in their original brief, petitioners attempt to twist the patented welding composition into a single one of its elements—alkaline earth metal silicate—which they christen "the single essential element" (Petitioners' Reply Brief, pp. 7-8).

Second, they try to transmute their Lincolnweld flux into a single one of its elements, namely, manganese silicate, by calling everything else "impurities" (Petitioners' Reply Brief, pp. 8-9).*

The answer, of course, lies in the actual findings of the Trial Court which petitioners have either ignored or misrepresented. Specifically, we find in Findings Nos. 20-22:

> "20. The accused Lincolnweld flux and the composition of the patent in suit are substantially identical in operation and in result.
>
> "21. The accused Lincolnweld 660 flux is a calcium manganese aluminum silicate with calcium fluoride added, which in welding operation is in all respects equivalent to the compositions of the patent in suit. Said flux contains:

* Calcium fluoride is mentioned, but is conveniently forgotten, when petitioners compare the two fluxes (Petitioners' Reply Brief, p. 8).

Constituent	Per Cent (by weight)
CaO	2.66
MnO	48.19
SiO_2	40.30
Al_2O_3	1.88
Fe_2O_3	1.33
CaF_2	3.92
TiO_2	0.10
MgO	0.60
BaO	0.87
S	0.02

"22. A person skilled in the art can produce the accused Lincolnweld 660 flux by following the teaching of the patent in suit. No evidence was introduced to show that the accused flux was derived from the prior art or by independent experiment, or from any source other than the teachings of the patent in suit." (R. 926)

Finding No. 21, it may be noted, is strikingly different from the representation set out on page 8 of petitioners' reply brief.

It is apparent from his findings that Judge Swygert rejected petitioners' argument, because he correctly viewed the Jones *et al.* patent as one covering not a chemical element, but rather a welding composition—made in accordance with the patent specifications and having properties and constituents (including, among other things, one or more of the alkaline earth metals) as set out in the valid claims. Claim No. 23 is representative:

"A finely-divided unbonded fusible composition for use in electric welding employing a bare metal electrode as a source of weld metal, said composition being substantially free from substances capable of evolving a detrimental quantity of gas under welding conditions and containing calcium fluoride and a

major proportion of one or more alkaline earth metal silicates." (p. 6, col. 2, line 13 *et seq.*, R. 960).

Each element is essential, and every one—with the single exception of manganese—is present in the Lincolnweld flux.

The same error vitiates petitioners' charge (Reply Brief, p. 9) that Linde was "reckless" in asserting that its welding composition "never existed prior to this invention, and it has no other known use in industry" (Respondent's Brief on Rehearing, pp. 3-7). This Court's affirmance of the Trial Court's determinations of validity and non-infringement should have foreclosed another repetition of these thrice-rejected arguments.

Moreover, as pointed out in our main brief on rehearing (p. 73), petitioners' argument that manganese was "dedicated" must fail, not merely because it was not pleaded (Petitioners' Reply Brief, p. 9), but because these infringers were on notice that the claims were intended to cover, not only the compositions literally within their scope, but their equivalents as well (see Respondent's Brief on Rehearing, pp. 23-24, 41).

In Reply to Pages 10-17 of Petitioners' Reply Brief—"II. Doctrine of Equivalents," Etc.

In our main brief on rehearing, we charged that petitioners had misrepresented the state of the authorities applying the doctrine of equivalents (p. 47). They refer to this as a "minor divergence" from their analysis (see Petitioners' Reply Brief, p. 10).

By way of reply, petitioners set out quotations from one of the cases to which we referred (Petitioners' Reply Brief, p. 10, fn. 5).

These quotations confirm our charge.

The "colorable departure" referred to in the *Sanitary Refrigerator Co.* case (280 U. S. 30, pp. 41-42) demonstrates that "literal infringement" was not the sole criterion for that decision. And petitioners confirm that the *National Cash Register* decision (156 U. S. 502 (1895)) is "the same type of case" (see Petitioners' Reply Brief, p. 10, fn. 5).

In their discussion of the *Halliburton* case (Petitioners' Reply Brief, p. 16), petitioners do not even advert to, much less explain, the language from the Court's opinion (quoted in Respondent's Brief on Rehearing, p. 25), which is plainly inconsistent with the view that petitioners cannot be held accountable unless "literal infringement" is present.

Petitioners assert, however, that our arguments would result in uncertainty as to the scope of patent protection, against which the public must be protected.

Parties who have so exactly copied that which has been patented, and who so strongly assert that they are acting to protect the public interest, bring themselves within the category mentioned in *Paul E. Hawkinson Co.* v. *Dennis, et al.*, 166 F. 2d 61, 62 (5th Cir. 1948):

> "* * * defendants, by the device of presenting themselves as defenders of the public interest, draw attention from the less savory role assigned them by plaintiff as infringers pirating plaintiff's invention."

There was not, and could not be, any honest confusion in this case. Judge Swygert found petitioners guilty of infringement because he was able to reject, as untrue, their assertion that they had followed J. C. Lincoln, Robinoff, National Tube, Miller, or any of the other multifarious prior art references upon which they relied. He found that petitioners followed Jones *et al.* (Finding No. 22, R. 926).

Petitioners also challenge the patentees' need for the protection of the doctrine of equivalents in this case (Petitioners' Reply Brief, pp. 13-16).

As against petitioners' *First* contention, that no claim was drawn specifically covering manganese because counsel realized that Miller barred the way, we have the express finding of the Trial Court that Miller did not anticipate Jones, which was made with specific reference to his concurrent holding that the Lincolnweld flux infringed Jones (R. 920-921; Finding No. 25, R. 927).

Petitioners' *Second* contention (p. 13) has already been dealt with in our main brief on rehearing (pp. 40-41), where it was pointed out that to divide the invention among a whole series of patents would not have contributed any benefit to the public and would have entailed a grave risk of invalidity for "double patenting."

Petitioners' *Third* contention is that Linde should be denied the application of the doctrine of equivalents because a Markush claim was available to them.

This simply is not so.

As we pointed out in our main brief (p. 39), the original decision in *Ex parte Markush*, 1925 C. D. 126, might have provided a solution, but the use of the so-called "Markush type claim" was soon restricted to those instances—and only those—where the specified list of substances formed a part of what had already been recognized at some earlier date as a distinct chemical class or genus.

To refute this, petitioners call attention to the early case of *Ex parte Larson*, 1932 C. D. 17. With respect to this very case it was stated, as of the time the applications here involved were under consideration, in Richard, *Claims Under the Markush Formula* (1935), 17 J. Pat. Off. Soc'y 179, 189:

> "The only conclusion to be drawn is that *Ex parte Larson* does not accord with present practice."

Petitioners also point out that in *In re Swenson*, 132 F. 2d 336 (C. C. P. A. 1942), the Court, in rejecting a Markush

claim on the ground that the group was improper, attempted to reconcile the *Larson* case with the more restricted rulings of the Patent Office.

In a recent article—Seidel, *Markush Claims—The Problem of Proper Grouping* (1949), 17 Geo. Wash. L. Rev. 225, —all of the cases bearing upon the allowance of Markush claims are reviewed. That article points out that the *Larson* case cannot be reconciled with the other more restrictive rulings of the Patent Office unless the special chemical problems relating to catalysts provide the answer. The writer states:

> "A point to be borne in mind concerning the *Larson* case is that it relates to a catalyst and that the concept of equivalency and reasoning by analogous composition has always been different for catalysts than for other chemical compositions" (p. 228).

On the basis of a review of the decisions, the writer states as to the *Swenson* case:

> "It is respectfully submitted that the court is in error in its method of attempting to reconcile the *Larson* and *Palmer* decisions" (p. 230).

Nor are the petitioners correct in their interpretation of the *Kingston* case (149 F. 2d 181 (C. C. P. A. 1945)). That case, just as was asserted in our main brief (p. 40), did show that aluminum, zirconium and calcium could not be combined in a Markush claim, even if a proper Markush form of statement had been employed. The Court said:

> "'The claims do not recite a group of substances in the Markush form. They are alternative with respect to the fourth element. Insofar as they are intended to form a group of the Markush type, they are improper because aluminum, zirconium and cal-

claim would not be expected to be equivalents for the intended purpose, from a knowledge of the prior art' " (p. 183).

In Reply to Pages 17-22 of Petitioners' Reply Brief—"III. If Rule of Equivalents Still Has Vitality, the Doctrine, No Matter How Broad, Cannot Enlarge Claims to Cover Manganese Silicate," Etc.

The contentions made by petitioners under this heading require no reply beyond what has already been stated in our main brief on rehearing (pp. 69-71).

As we there pointed out, the Trial Court specifically held that Miller did not anticipate the patent in suit. That issue is foreclosed by this Court's original decision affirming the holding of validity, on which rehearing was neither requested nor granted.

In making his determination that Miller did not anticipate the patent in suit, the Trial Court expressly rejected petitioners' contention that such determination could not be made in conjunction with a holding that the Lincolnweld flux, containing manganese silicate as one element, is an infringement (R. 920-921).

The reason is clear. Although Miller refers to manganese silicate, the Lincolnweld flux consists of much more than manganese silicate, as the Trial Court found (*e.g.*, Finding No. 21, R. 926). Indeed, it is substantially the same thing as the patented composition, with which it conforms in preparation, ingredients, proportions, and physical and chemical conditions. These facts too are covered by the Trial Court's findings (*e.g.*, Findings Nos. 20-22, R. 926-927).

Therefore petitioners' argument is also, like all the others, an indirect attack upon the factual findings of the Trial Court, even though petitioners are completely unable,

and do not even try, to show that such findings are not supported in the record.

More than this is required to overturn concurrent findings of both lower courts.

Petitioners again assert that, if their flux was construed to be an infringement, the patent would include inoperable compositions (Petitioners' Reply Brief, pp. 19-20). Their argument is typical, because they do not even refer to the finding quoted in our main brief on rehearing (pp. 71-72), which discloses on its face that the Trial Court passed specifically upon the operability of all nine of the metallic silicates used by the inventors.

Petitioners' repetition of their argument that the patent provided only for the substitution of manganese in "moderate amounts" directly contradicts an express finding of the Trial Court (Finding No. 24, R. 927). That finding was based upon the expert testimony of those skilled in the art (see Respondent's Brief on Rehearing, pp. 30-31, 65).

Ellis on Patent Claims—First Cited at the Oral Argument—Supports Our Position.

Ellis on Patent Claims (1949), cited by petitioners at the oral argument, contains a labored exposition of that author's views as to what the law relating to patent claims should be, rather than what it is. Decisions of this Court and propositions which are not entirely in accord with Mr. Ellis' argument are relegated into "exceptions," so phrased as to condition the reader's mind to ignore them.

Moreover, the most striking feature of Mr. Ellis' discussion of so-called "peripheral definition claims" is his unqualified admission (in Section 37 at p. 41):

"It is impossible to define the boundaries of an invention with anything approaching the exactitude of the boundaries of a parcel of land as set out in a real estate deed."

And in his Section 60, beginning at page 74, the author outlines the circumstances under which a claim specific to one substance, A, has been held infringed by the use of another substance, B. According to this statement there are four requirements for such a holding,—each and every one of which is satisfied in the case at bar. Thus:

(1) "Substance B is an equivalent of A" is satisfied by the Trial Court's Findings Nos. 20-24, inclusive (R. 926-27).

(2) "The specification makes it clear that the inventor realized that the results of his invention could be obtained not only by A but also by other members of the general class of substances to which A belongs" is satisfied by the inventors' statement in the specification that nine named metallic silicates would be operative as ingredients of their new composition.

(3) "The restriction to A must be not only voluntary (i. e., not required as a condition for the issuance of the patent) but also not clearly intentional" is satisfied by the fact that the patent in suit contains claims covering "silicates," which, of course, include manganese silicate (Nos. 24 and 26).

(4) "The use of A must be a subsidiary feature of the invention" is satisfied by the fact that manganese is only one ingredient of the welding composition, which must conform to many other physical and chemical characteristics in order to be operative as a welding composition within the meaning of the patent.

Conclusion.

The judgment of the Trial Court should be reaffirmed.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Respondent, The Linde Air Products Company.

JAMES A. FOWLER, JR.,
RICHARD R. WOLFE,
GEORGE N. BEAMER,
LOFTUS E. BECKER,
Of Counsel.

March 29, 1950.